IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-241

ARPEJA-CALIFORNIA, INC.,

Petitioner,

v.

JARRET N. COHANE,

Respondent.

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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In this Memorandum, respondent Jarret N. Cohane accepts the "Opinion Below" and the "Statement of the Case" found in the Petition.

JURISDICTION

In asserting jurisdiction under 28 U.S.C. §1257(3), Petitioner simply passes over the question of whether the judgment appealed from is "final" within the

meaning of this statute. We note at the outset that the judgment appealed from was clearly not "final" as a matter of fact since it obviously did not "dispose of the litigation."[1] We recognize that there are exceptions to the finality rule and that this Court has recognized such exceptions in the context of the kind of jurisdictional issue presented in this case. *Shaffer v. Heitener*, 433 US 186 (1977).[2] The question is the breadth of the exception which *Shaffer* recognized. We suggest that the *Shaffer* holding should be limited to the peculiar situation under Delaware law described in footnote 12 of that opinion (433 US at 195-196). Indeed, if *Shaffer* is not so limited, every denial of a motion to dismiss for lack of jurisdiction under the rule of *International Shoe Co. v. Washington*, 326 US 310 (1945) would possess the requisite finality.

QUESTION PRESENTED

Did the trial court have jurisdiction to entertain a suit for breach of contract against a nonresident foreign corporation where the contract required partial performance in the forum state and such performance was in fact done in the forum state?

[1] Indeed, the trial court, having twice previously denied a motion to dismiss for lack of jurisdiction, dismissed the complaint in the midst of plaintiff's testimony on the ground of forum non conveniens. Certainly a completed trial record would benefit this Court, as well as the courts below, in judging whether Petitioner's contacts with the forum were such as to properly subject it to trial there.

[2] Petitioner's awareness of *Shaffer* (Petition, p. 8 and 10) makes its avoidance of this issue all the more significant.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

28 U.S.C. §1257 provides in pertinent part:

> *Final judgments* or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * *
>
> (3) By Writ of Certiorari, where . . . the validity of a state Statute is drawn and questioned on the ground of its being repugnant to the Constitution . . . of the United States. (emphasis added)[3]

REASONS FOR NOT ALLOWING THE WRIT

1. Petitioner's argument that the decision of the District of Columbia Court of Appeals conflicts with *McGee v. International Life Insurance Co.*, 355 US 220 (1957), misconstrues the facts of this case and the holding of *McGee*. The record is undisputed that the contract between Petitioner and Respondent required performance (sales) in the District of Columbia as well as four other states and that sales were in fact made in the District of Columbia. Petitioner argues, however, that "the complaint failed to allege that any commissions were lost as the result of any transactions in the District of Columbia" (Petition at p. 8). Based "on the record" the District of Columbia Court of Appeals disposed of that argument in the following words:

> In the present case, appellant alleged in his complaint that appellee sold to clothing stores in

[3] The relevant sections of the Fifth Amendment and D.C. Code Section 13-423 (the District of Columbia's Long-Arm Statute) are set forth in the Petition at pages 2-3.

> the District of Columbia and received payment for those sales. Appellee also contracted with appellant to solicit orders and sell goods here. In the affidavit filed in support of appellee's motion to dismiss, appellee did not deny that appellant's claim arose, in part at least, out of sales in the District of Columbia.

Based on the law, the Court of Appeals correctly affirmed the lower Court's jurisdiction by relying upon *McGee:*

> Finally, we find that our exercise of jurisdiction in the present case does not offend due process. As the Supreme Court indicated in *McGee v. International Life Insurance Co.*, 355 US 220 (1957), "[i]t is sufficient for purposes of due process that the suit was based on a contract which has substantial connection with that state." See generally *Shaffer v. Heitner*, 97 S.Ct. 2569 (1977).[5]

2. Respondent further submits that even through the complaint satisfactorily alleges that the claim arose at least in part from District of Columbia sales made pursuant to the contract, such allegations were unnecessary. To the contrary, it would have been sufficient to allege that the claim arose from the contract rather than specified sales. Accordingly, even if Respondent's claim for unpaid commissions were based solely on sales in other states in which he was also obliged to make sales, the fact that such sales were pursuant to a contract which also required performance in the forum state is itself sufficient to confer jurisdiction at least where work was performed in the forum state. *McGee v. International Life Insurance Co., supra.*

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[4] *Cohane v. Arpeja-California, Inc.*, 385 A.2d 153, 159, Appendix A to Petition at 13a.

[5] *Id.*

3. Petitioner's argument that the issue presented here is "important" is patently contrived. Essentially this argument has two premises. The first is that this decision is important simply because it affects multistate businesses; but, of course, so do all decisions involving jurisdiction over nonresident corporations. The second premise is that because this case requires an interpretation of a statute similar to the Uniform Interstate and International Procedures Act, its effect will be felt in virtually every state. That is not so because no state is required to follow a decision of the District of Columbia Court of Appeals. Indeed Petitioner is simply requesting this Court to give an advisory opinion to those States bound by the Act.

CONCLUSION

The foregoing demonstrates that the Petitioner's substantive argument on the Constitutional issue is frivolous and the claimed "importance" of the issue presented is purely contrived. Indeed, the only question of any substance is whether this Court even has jurisdiction under Section 28 U.S.C. §1257(3) to consider this matter.

Respectfully submitted,

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